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No. 00-38

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ACTING ATTORNEY GENERAL, ET AL., PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A. *Statutory Authority.* The Ninth Circuit plainly erred in holding that the Attorney General's statutory authority to detain dangerous criminal aliens under 8 U.S.C. 1231(a)(6) (Supp. V 1999) is limited to an unspecified "reasonable time" beyond the 90-day removal period—and, in particular, that the statute does not allow the Attorney General to hold such aliens beyond that 90-day period if there is not a reasonable likelihood that they will be removed in the reasonably foreseeable future. As we demonstrate in our opening brief (at 18-45), that holding is contrary to the text of Section 1231(a)(6), the structure of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the Act.

1. a. Section 1231(a)(6) provides that an alien "may be detained beyond the removal period" if, *inter alia*, the alien has committed a specified criminal offense, or has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. 8 U.S.C. 1231(a)(6) (Supp. V 1999). Section 1231(a)(6) imposes no temporal or other limitations on the Attorney General's discretion. To the contrary, as the Tenth Circuit emphasized, Section 1231(a)(6) "*expressly* allows for continued detention beyond the removal period with no time limit placed on the duration of such detention." *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1057 (2000). Compare *Lopez* v. *Davis*, No. 99-7504 (Jan. 10, 2001), slip op. 10-11 (constraints urged by prisoner on Bureau of Prisons' discretion "are nowhere to be found" in the statute).

Contrary to respondent's contention (Br. 31-32), Section 1231(a)(6) is not ambiguous merely because it does not specify how long the Attorney General may detain an alien. Congress granted the Attorney General the authority to detain or release an alien at *any* point "beyond the removal

period." If there is any lingering doubt, however, the Attorney General's determination that the facially unqualified text of Section 1231(a)(6) authorizes detention of an alien who poses a danger to the community even if the alien's country of citizenship has not agreed to his prompt return is reasonable and is entitled to deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); compare *Lopez* v. *Davis*, slip op. 11.

b. Respondent's citation (Br. 32-34) to INA provisions that specifically address situations in which an alien cannot be removed because of obstruction by the alien or recalcitrance by his country of citizenship supports, rather than undermines, the Attorney General's interpretation of Section 1231(a)(6). In particular, 8 U.S.C. 1231(a)(7) (Supp. V 1999), the subsection immediately following Section 1231(a)(6), provides that, although generally aliens who are ordered removed are ineligible to receive work authorization, that prohibition does not apply if an alien "cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien." That exception in Section 1231(a)(7) refutes respondent's suggestion that Congress did not contemplate that other countries might refuse to accept an alien when it enacted the broad detention authorization in Section 1231(a)(6), and it demonstrates that Congress would have carved out an express exception to that authorization if it had intended to require that such aliens be treated differently for detention purposes. See Gov't Br. 25-26; see also Gov't Br. 39 n.23, 42 n.25.

c. Respondent contends that Congress could not have meant to allow "indefinite" detention under Section 1231(a)(6) of aliens whose removal orders were based on grounds that are not premised on dangerousness. See Resp. Br. 34-35 (citing 8 U.S.C. 1227(a)(1)(C) (Supp. V 1999) (visa violations)). Congress, however, did not *mandate* the detention of those or any other aliens covered by Section 1231(a)(6), and perhaps many or most of the aliens respondent has in

mind would be released by the Attorney General as neither dangerous nor flight risks. But respondent is mistaken to suggest that an alien whose order of removal is not based on a criminal conviction could not pose a risk of danger to the community or of flight if released. Compare *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 473 (1999) (aliens believed to have raised funds for terrorist organizations charged with deportability for overstaying visas).

d. Respondent asserts (Br. 35) that it is anomalous to interpret Section 1231(a)(6) to allow for detention that may extend beyond the criminal sentence that could be imposed for violation of conditions of release (8 U.S.C. 1253(b) (Supp. V 1999) (one-year maximum)) or willfully preventing one's own removal (8 U.S.C. 1253(a) (10-year maximum)). But detention of an alien who poses a danger to the community prevents harm from occurring in the first place, rather than imposing punishment after the fact. Moreover, a primary purpose of Congress in enacting Section 1231(a)(6) and the other detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, was to prevent criminal aliens from reentering our criminal justice system. Unlike imprisonment as punishment for a crime, which in some instances may preclude removal of an alien even after a travel document becomes available (see 8 U.S.C. 1231(a)(4)(A) (Supp. V 1999)), immigration detention allows an alien to be removed as soon as a travel document is obtained.

2. As we explain in our opening brief (at 31-33), and as respondent concedes (Br. 35-36, 39-40), Section 1231(a)(6) is the culmination of a series of amendments to the INA, dating back to 1990, that mandated the detention of certain criminal aliens even after the expiration of the six-month period following entry of a final deportation order— at least in the absence of a showing by the alien or determination by the Attorney General that the alien was not a threat to the

community and was likely to appear for any scheduled hearings. See Gov't Br. 31-33; Resp. Br. App. 8a-15a (reproducing relevant statutory provisions). None of those amendments made any exception for aliens who could not be deported because their countries of citizenship would not take them back.

Respondent nevertheless claims (Br. 36) that the Attorney General's interpretation of Section 1231(a)(6) to grant him the discretion to detain such aliens "marks a 'stark' departure from past law." To support that contention, respondent asserts (*id.* at 39-40 & n.27) that those predecessor provisions, despite their explicit text, did not actually apply to what respondent calls "undeportable aliens," because those provisions did not specifically refer to such aliens. See *id.* at 36, 39-40 & n.27. Respondent cites nothing (and there is nothing) in the text, legislative history, or judicial interpretation of any of those amendments to support that assertion. Indeed, the most common reason why an alien cannot be removed promptly is that the alien's country of citizenship has declined to accept his prompt return; and, in any event, Congress's overriding concern was that criminal aliens would commit further crimes while they remained in the United States, irrespective of *why* they remained here. Respondent's argument for an implied exception from those predecessor statutes therefore is inconsistent with the central premises of their authorization for continued detention.[1]

[1] Respondent notes (Br. 36-37) that in cases in the 1920s and early 1930s arising under the Immigration Act of 1917, ch. 29, 39 Stat. 874, several lower courts had held that an alien ordered deported could be detained for only a "reasonable" time to effectuate deportation. That Act was not at all similar to Section 1231(a)(6) because it contained no provision expressly authorizing detention beyond a deportation period. It provided simply for an alien to "be taken into custody and deported" (Resp. Br. 36 n.23), which suggests detention only *during* a period of actual deportation. In any event, the rationale of those old decisions is unclear, and they are of no relevance in interpreting Section 1231(a)(6), which has a distinct text and statutory history. See also Gov't Br. 24 n.14.

It is, in fact, respondent's interpretation of Section 1231(a)(6) that would reflect a dramatic change from the detention provisions that preceded its enactment. Under respondent's interpretation, the Attorney General would be required to release a criminal alien in respondent's circumstances immediately upon expiration of the 90-day removal period—despite the Attorney General's determination that the alien would pose a danger to the community or a risk of flight if released. There is no evidence whatsoever to suggest that Congress intended a radical departure from the mandatory detention provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that would not only permit but *require* the Attorney General to release such an alien. As we have explained (Gov't Br. 33-43), the legislative history of AEDPA and IIRIRA confirms that Congress did not do so, but instead vested the Attorney General with discretion to release criminal aliens "whose home countries will not or cannot take them back," if "the Attorney General believes the alien would pose no danger to the community." See

Respondent also notes (Br. 32 n.20, 34, 37) that in 1950, Congress failed to pass a bill that would have authorized detention of certain aliens "until departure from the United States." As respondent points out (Br. 37), the House did pass that bill, in an effort to address the situation in which another country would not accept the return of dangerous aliens. See H.R. Rep. No. 1192, 81st Cong., 1st Sess. 3, 6-7, 9-10 (1949). The Senate did not agree to that provision. Respondent quotes a statement in the Senate Report that the provision "appears to present a Constitutional question" (Br. 37 (quoting S. Rep. No. 2239, 81st Cong., 2d Sess. 8 (1950)), and asserts on that basis that the provision "was rejected on constitutional grounds" (Br. 34). The Senate Report expressly states, however, that "[t]he committee, *without undertaking to pass on the constitutionality of this provision*," decided to delete it and to provide instead for criminal sanctions against certain criminal aliens who fail to depart the United States. S. Rep. No. 2239, *supra*, at 8 (emphasis added). All the legislative history of the 1950 Act shows, then, is that Congress decided not to enact then what it found necessary to enact in 1996. That episode half a century ago has no bearing on the interpretation of Section 1231(a)(6).

Gov't Br. 37 (quoting 141 Cong. Rec. 15,068 (1995) (remarks of Sen. Kennedy)).[2]

Under the Ninth Circuit's interpretation, by contrast, the Attorney General must release a criminal alien no matter how serious the risk of danger (or flight) the alien would pose, whenever a court determines that there is not a reasonable likelihood that the alien will be removed in the reasonably foreseeable future. Pet. App. 23a, 25a. And the Ninth Circuit's decision has in fact resulted in the release of many aliens who were found to present a serious risk of harm or flight if released—a finding supported in many cases by a substantial criminal history.[3]

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[2] Respondent attempts (Br. 42) to dismiss Senator Kennedy's comments as mere expressions of "fears and doubts" by an opponent of legislation. What respondent overlooks is that Senator Kennedy was speaking in opposition to Section 440(c) of AEDPA, which flatly prohibited the release of criminal aliens, and was urging that Congress instead enact a provision granting the Attorney General discretion to release a criminal alien whose country would not take him back. See Gov't Br. 37-38. Congress did precisely that when it enacted Section 1231(a)(6) as part of IIRIRA less than six months later. Congress acted in response not only to Senator Kennedy, but also to urging by the INS and Department of Justice, see Gov't Br. 40-42 & n.24, and as a compromise between the House version of the bill (which would have *mandated* the release of criminal aliens after the removal period) and the Senate version (which would have *prohibited* the release of such aliens); see *id.* at 34-35, 38.

[3] See, *e.g.*, *INS* v. *Your Khorn*, No. 00-668, Pet. at 4-7 (filed Oct. 26, 2000) (criminal history of repeated rape of children and no evidence of rehabilitation); *INS* v. *Oudone Mounsaveng*, No. 00-751, Pet. at 4-6 (filed Nov. 9, 2000) (convictions for rape of minor, reckless endangerment, drug possession, and attempt to elude police; juvenile adjudications arising out of street gang robberies of gun store (during which gang member was killed) and home (where masked gang members held 20 people at gunpoint); at least four arrests for failure to appear and two for probation violation; and disciplinary action while in custody for possession of sharpened instrument); *INS* v. *Saroeut Ourk*, No. 00-987, Pet. at 4-6 (filed Dec. 15, 2000) (conviction for rape of minor arising out of armed gang kidnapping and repeated rape and sexual assault of victim; repeated violations of parole); *INS* v. *Be Huu Nguyen*, No. 00-1000, Pet. at 4-7 (filed Dec. 18, 2000) (extensive criminal history, including convictions for drug-related offenses, disciplinary action for assaulting another detainee while in custody,

B. *Substantive Due Process.* Respondent argues (Br. 11-28), apparently as an alternative ground for affirmance, that Section 1231(a)(6) violates substantive due process if it authorizes the Attorney General to detain criminal aliens whose countries of citizenship will not accept responsibility for their repatriation, even if the Attorney General determines that the alien would pose a risk to the community or would be unlikely to comply with the order of removal if released. The court of appeals did not decide the constitutional issue, because it held that Section 1231(a)(6) does not grant the Attorney General that authority as a statutory matter. We address the substantive due process argument in our brief for the respondents in *Zadvydas* v. *Underdown*, No. 99-7791, which squarely raises that issue and has been consolidated with this case for oral argument. We address here several points made by respondent and his amici.

1. Respondent erroneously characterizes the government's position to be that "the constitutional guarantees of due process do not apply to aliens once they are ordered deported from the United States." Resp. Br. 14; see also *id.* at 13-15, 17. That is not our position. Aliens in the United States under final orders of removal are "persons" for purposes of the Due Process Clause. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982).

The entry of a final order of deportation or removal *does*, however, extinguish a person's status as an alien lawfully admitted for permanent residence, and it eliminates whatever legal right any alien might once have had to be in this country. See 8 U.S.C. 1101(a)(20) ("term 'lawfully admitted for permanent residence' means the status of having been

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and repeated violations of parole and INS supervision conditions while on earlier release from INS custody); *INS* v. *Thanh Duc Tran*, No. 00-985, Pet. at 4-7 (filed Dec. 15, 2000) (convictions for attempted murder and assault with firearm, flight from jurisdiction and fugitive from justice for two years, federal drug trafficking conviction, and institutional misconduct).

lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed*") (emphasis added); 8 C.F.R. 1.1(p) (lawful permanent resident status "terminates upon entry of a final administrative order of exclusion or deportation"). Thus, although respondent is correct that he once was "an alien whose 'constitutional status change[d]' when he gained admission to this country and lawfully 'develop[ed] the ties that go with permanent residence'" (Br. 14 (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982))), he ignores the fact that his status has now changed back to what it was before he was granted resident status, and he has no lawful right to maintain the ties that go with permanent residence.[4] Because an alien like respondent no longer has any right to be in the United States, or to work or to maintain any ties here, the alien has a greatly diminished claim to a liberty interest in being released into the community of the United States.

Entry of a final order of removal also has a significant bearing on what process is "due," both substantively and procedurally, with respect to detention and other immigration matters up to the point when the alien is actually removed from the United States. In determining what process is due, substantial weight must be given to the good faith judgments of Congress and of the Attorney General, to whom Congress has assigned the responsibility for admin-

[4] *Plasencia* teaches that, if an alien has been granted permanent resident status and has not departed from the United States for a significant period, that status will affect what process is due in proceedings to determine *whether* a final order of removal will be entered and the alien will be stripped of his privilege of remaining in the United States. See 459 U.S. at 32-37. But contrary to respondent's suggestion (Br. 14), *Plasencia* does not support the notion that heightened due process protection continues to apply even after permanent resident status is formally terminated. Respondent's reliance (Br. 13-14) on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953), is misplaced for the same reasons.

istering the INA and for weighing the relevant factors in doing so. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

In that regard, Congress has made clear, in the series of amendments culminating in the enactment of Section 1231(a)(6) in 1996, that in its judgment detention of a criminal alien under a final order of removal is justified if the alien poses a risk to the community or is unlikely to appear for further immigration proceedings—two undoubtedly legitimate concerns of the government. *United States* v. *Salerno*, 481 U.S. 739, 747, 749 (1987). See *Zadvydas* Gov't Br. 27-28 nn.13 & 14 (discussing widespread commission of crimes by criminal aliens after being released by INS during deportation process, as well as disappearance of criminal aliens who were released).

As the Fifth Circuit held in *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), for purposes of due process scrutiny of detention under the immigration laws in these circumstances, Congress reasonably may regard an alien like respondent, who is deportable and subject to a final order of removal, as standing on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. *Id.* at 288-290, 294-297; accord *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1058-1059 (10th Cir. 2000) (citing *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953)).[5]

Respondent contends (Br. 15-17) that *Mezei* does not support our position because the alien in that case was "excludable" (see Gov't Br. 19 n.10) while respondent was "deport-

[5] Congress treated the specified categories of deportable aliens and all "excludable" aliens (now termed "inadmissible" aliens, see Gov't Br. 19 n.10) the same for purposes of Section 1231(a)(6), vesting the Attorney General with the discretionary authority to detain both beyond the removal period. Congress also made no distinction between deportable and excludable aliens when it authorized the Attorney General to detain any alien the Attorney General determines "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).

able." But the due process analysis here turns not on the alien's status or the nature of the removal charges against him *before* entry of a final order of removal, but rather on the remaining interests the alien has *after* entry of such an order, weighed against the governmental purposes furthered by the detention. As explained above (pp. 7-9), after entry of a final removal order, an alien's lack of any right to be in the United States, and his resulting lack of any cognizable right to maintain and enjoy ties here, are the same whether the alien was previously excludable or deportable. Similarly, the United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, in protecting our society from any such foreign nationals who would pose a danger if released, and in ensuring the continued availability of an alien ordered removed, are the same whether the alien was previously excludable or deportable.

Furthermore, as a matter of sovereign power, the government's right to expel aliens who previously were permitted to reside in the United States "rests upon the same grounds, and is as absolute and unqualified, as the right to prevent their entrance into the country" in the first place. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707, 713 (1893) (see Gov't Br. 37-38). For deportable as well as excludable aliens, Congress may legitimately determine that "other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs." *Mezei*, 345 U.S. at 216. Indeed, insofar as the alien's own country of citizenship is concerned, the alien is that country's responsibility *rather than* ours, and the alien must look primarily to that country for his liberty, once it allows him to return.[6]

[6] Respondent asserts (Br. 16) that in its brief in *Mezei*, the government acknowledged a difference between the indefinite detention of an excludable alien and a deportable alien. The government's brief in *Mezei* noted that two district courts had held that aliens could not be detained indefinitely while the INS sought to carry out their deportation orders, and stated that that theory was erroneous when applied to exclusion cases. Gov't Br. at 20 & n.9, *Mezei*, *supra* (No. 139). The brief went on to state that the then-recent 1950 amendments to the immigration laws limiting the period of detention pending deportation to six months (see note 1, *supra*) were "appropriate because confinement in deportation cases is merely a step in aid of expulsion and, if too long continued, the confinement takes the place of the deportation which was ordered." *Id.* at 20. That statement of a possible rationale for a six-month detention period in the statute as it then existed does not affect the constitutionality of Section 1231(a)(6), which embodies Congress's considered judgment, in the current domestic and foreign context, that the Attorney General should be authorized to detain an alien beyond the now-90-day removal period, when necessary to protect the community.

2. Contrary to respondent's contention (Br. 21-23), substantial deference is due under the Constitution to the Attorney General's decision to detain an alien under a final deportation order, pursuant to authority expressly granted by Congress. This Court has long recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). As we explain in our opening brief (at 44) and in our brief in *Zadvydas* (at 20-22), there is no exception to these fundamental principles of deference for matters concerning the detention of aliens who have been ordered removed from the United States. Indeed, "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896).

Issues concerning the detention or release of such aliens have clear implications for the Nation's sovereignty, security, and foreign relations. These concerns may be especially

pronounced when the removal of a dangerous criminal alien cannot be effectuated immediately because of the refusal by another nation to accept responsibility for its own citizens. That could be true, for example, when the other country's refusal is part of a broader diplomatic schism between the two nations, or when arrangements for repatriation are linked to efforts at a more general normalization of relations. There would be serious adverse consequences for the United States if that other country, simply by refusing to accept the return of its own citizens, could force the United States to allow those aliens to be at liberty in the United States, even if they would cause harm to the community or flee if released. And those consequences would be exacerbated if a court of the United States ordered the release of the aliens on the basis of its own determination that they are unlikely to be removed in the near future because of such recalcitrance. The effect would be to undermine the position of the political Branches in the international community that the other nation must promptly accept the return of its citizens who have been ordered deported from the United States. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS* v. *Aguirre-Aguirre*, 526 U.S. at 425. For these reasons, the plenary power of the political Branches over immigration matters necessarily encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. See *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993).

This Court has also made clear that, when Congress vests in the Attorney General the discretionary authority over detention decisions regarding aliens subject to deportation, such decisions are subject to only the most deferential standard of judicial review. See *Flores*, 507 U.S. at 306 (INS regulation governing detention must meet "the (unexacting) standard of rationally advancing some legitimate governmental purpose"); *Carlson* v. *Landon*, 342 U.S. 524, 540-541 (1952) (noting congressional intent "to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse"); *Mezei*, 345 U.S at 210; *Zadvydas* Gov't Br. 23. Respondent's argument (Br. 17, 20-21, 27-28) for heightened due process scrutiny (requiring least-restrictive-means or narrow-tailoring) cannot be reconciled with those rulings.

3. Respondent concedes (Br. 18) that the government "has a legitimate interest in effectuating deportation and, in so doing, protecting the public and preventing risk of flight." Accord ACLU Br. 2. Respondent contends (Br. 23-28), however, that detention of aliens in his position is unconstitutionally excessive compared to the interests the government seeks to protect. That contention is without merit. If the Attorney General concludes that an alien under a final order of removal would pose a danger to the community or risk of flight if released, then retention of that alien in custody beyond the 90-day removal period, subject to periodic review, corresponds directly to Congress's legitimate interests. In *Mezei* and *Carlson*, the Court sustained the continued detention of aliens based on determinations of future dangerousness. See *Zadvydas* Gov't Br. 29-31. The Court also has upheld the constitutionality of detention based on future dangerousness in other contexts, involving citizens, where the special deference to the political Branches in matters regarding aliens was not even involved. *Kansas* v. *Hendricks*, 521 U.S. 346, 356-357 (1997); *Salerno*, 481 U.S. at 748-751; see *Zadvydas* Gov't Br. 31-34, 46-47.

Respondent invokes (Br. 19) the Court's observation that in the context of civil commitment, "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," and that civil commitment statutes have been sustained "when they have coupled proof of dangerousness with proof of an additional factor such as 'mental illness' or 'mental

abnormality.'" *Hendricks*, 521 U.S. at 358. But of course neither the Attorney General's taking of an alien into custody upon the filing of removal charges, nor the retention of dangerous criminal aliens in custody during removal proceedings and pending their actual removal, is civil commitment under this Court's cases. It is an exercise of the United States' sovereign powers to expel or exclude aliens from the country. Furthermore, the detention of an alien in respondent's circumstances does not depend on a "finding of dangerousness, standing alone." *Ibid.* Under governing regulations, detention is based on the likelihood of future dangerousness (or flight), "coupled" with an "additional factor" (*ibid.*) of great significance—the entry of a final order or removal, which terminates any right of the alien to be at liberty in the United States. Nothing in *Hendricks* or related cases undermines the power of Congress to authorize the Attorney General to detain an alien who is under a final order of removal in these circumstances.

4. Moreover, the administrative procedures adopted by the Attorney General guard against detention that is not related to the concededly legitimate governmental interests that Section 1231(a)(6) serves. Those procedures afford an alien an ongoing opportunity to be released from detention by demonstrating that he would not pose a danger to the community or risk of flight if released. The current procedures are set forth in a regulation that was published by the Attorney General in final form on December 21, 2000, following notice and comment. See 65 Fed. Reg. 80,281-80,298 (to be codified at 8 C.F.R. 241.4 (reproduced at *Zadvydas* Gov't Br. App. 9a-26a)). (All subsequent citations are to this revised version of 8 C.F.R. 241.4). That regulation supersedes the regulation promulgated in 1997 that initially governed detention beyond the removal period under Section 1231(a)(6).

a. The procedures under the new regulation are modeled after those that, since 1987, have governed the detention or

release of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. 8 C.F.R. 212.12. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (upholding Mariel Cuban Review Plan against constitutional challenge). Like the Mariel Cuban Review Plan, see 65 Fed. Reg. 80,289, the new regulation provides for an automatic annual review of any alien who has been retained in custody and allows for more frequent reviews, initiated by either the alien or the INS, thus evincing INS's intent regularly to reconsider aliens for release, consistent with the interests in ensuring against flight and danger to the community. Compare *Hendricks*, 521 U.S. at 364 (upholding civil commitment of sexually violent predator as "only *potentially* indefinite" because the determination regarding commitment must be made annually, thereby demonstrating that the State does not intend a detainee to remain in custody beyond the period during which he continues to present a threat of dangerousness).

The new regulation also builds on several memoranda that were issued by the Executive Associate Commissioner of the INS in 1999 to provide guidance to field offices to supplement the initial 1997 detention regulation. See Gov't Br. 6-7, 11-12; *Zadvydas* Gov't Br. 40-46; *id.* App. 32a-39a. Those memoranda afforded significant additional protections and benefits to aliens who remained in custody under a final order of removal. During the period from February 1999, when the first of those memoranda was released, through mid-November 2000, "approximately 6,200 aliens [were] provided custody reviews by district directors * * * to determine whether detention of the alien beyond the 90-day removal period is warranted." 65 Fed. Reg. at 80,285. "Of those aliens, approximately 3,380 were released." *Ibid.* Both the Third and Fifth Circuits endorsed that interim

framework for custody reviews in rejecting constitutional challenges to detention beyond the removal period under Section 1231(a)(6). *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 399 (3d Cir. 1999) (INS's interim procedures "provide[d] reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States); *Zadvydas*, 185 F.3d at 287-288.[7]

b. The new regulation transfers authority from district directors (where the decisionmaking authority rested under the old regulation) to an INS Headquarters Post-Order Detention Unit (HQPDU), see 8 C.F.R. 241.4(c)(2) and (k)(2)(ii), patterned after the unit that has reviewed Mariel Cuban cases for the past decade, see 8 C.F.R. 212.12. That centralized Headquarters review separates the responsibility for continued custody determinations from the responsibility for conducting the removal proceedings themselves, and provides for expertise and uniformity of treatment in reviewing the detention of aliens throughout the country.

The HQPDU will ordinarily conduct a custody review during the first three months of detention under Section 1231(a)(6) or as soon thereafter as practicable. 8 C.F.R. 241.4(k)(2)(ii).[8] The panel will provide the alien with 30 days' notice of its review. *Ibid.* It will first conduct a records review; if the alien is not released based on that review, he is entitled to an interview by a two-member panel designated to make recommendations to the Executive Associate Commissioner. 8 C.F.R. 241.4(i)(1), (2) and (3). The alien may be accompanied by a person of his choice at the interview. 8 C.F.R. 241.4(i)(3)(i), (ii). An alien also is entitled to submit to the panel any written information that supports his release. 8 C.F.R. 241.4(i)(3)(ii). If the two panel members disagree, a third reviewer is added to vote on the release decision. 8 C.F.R. 241.4(i)(1). The panel will provide a written recommendation that includes a brief statement of the factors the panel deemed material to its recommendation. 8 C.F.R. 241.4(i)(5). The Executive Associate Commissioner will then make the final release determination based on the criteria in the regulation and all relevant information. If an alien is not released from custody by that decision, his case is automatically reviewed within approximately one year of such a decision. 8 C.F.R. 241.4(k)(2)(iii). In the meantime, an alien may submit a written request (not more than once every three months) to the HQPDU for release based on a material change in circumstances. *Ibid.*. The HQPDU, in its discretion, may also review a detainee at shorter intervals. 8 C.F.R. 241.4(k)(2)(v). A copy of any decision to release or detain an alien must be provided to the detained alien, and a decision to retain custody must briefly set forth the reasons for the continued detention. 8 C.F.R. 241.4(d).[9]

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[7] As the INS also explained when it promulgated the new regulation in December 2000, "[t]he experience of the Cuban Review plan concretely demonstrates that these procedures provide sound decision making for both the Government and the alien." 65 Fed. Reg. 80,285. Since the inception of that plan in 1988, "parole has been granted in over 7,000 cases (some of these may be the same individuals who are reparoled)." *Ibid.*

[8] An initial review, typically conducted by the district director, will be conducted even before the 90-day removal period expires and responsibility is transferred to the HQPDU. 8 C.F.R. 241.4(c)(1), (h)(1), and (k)(2)(*i*). The purpose of that initial review is to afford an opportunity for immediate release, without the need for more elaborate procedures, if it appears from the available information that the alien does not pose a danger to the community or a flight risk. In preparation for the review, the alien is provided access to his INS A-file, which contains all written custody recommendations and decisions, as well as material relevant to the alien's immigration history generally and information regarding his criminal history. 65 Fed. Reg. 80,286, 80,290. The INS also will provide the alien with a list of available pro bono or low-cost legal representatives who may assist the alien in the process. *Id.* at 80,284.

[9] Respondent's amici allege (Catholic Legal Immigration Network Inc., et al. (CLINIC) Br. 7-10, 14-21) that there have been inadequacies in particular cases in the past that would be inconsistent with the procedures described in the text under the new regulation. As amici recognize (CLINIC Br. 8-9), however, some of those problems arose because of confusion about the eligibility of some aliens for release under the mandatory detention provisions of AEDPA, the transition period custody rules that

c. Respondent's amici note that the foregoing procedures do not include all of the features of the pretrial-detention and civil-commitment schemes that have been upheld by this Court. See Catholic Legal Immigration Network, Inc., et al. (CLINIC) Br. 7-29; ACLU Br. 13-17. Unlike the individuals in those cases, however, respondent has been adjudged to have no legal right to be in the United States. That core component of his liberty interest thus has already been extinguished under procedures that concededly satisfy due process. Furthermore, as we have already explained, great deference is due the Attorney General's implementation of the congressionally vested authority over detention of criminal aliens beyond the removal period.

In any event, a number of the specific objections by respondent (Br. 21) and his amici (CLINIC Br. 10-24; ACLU Br. 5, 13-16, 23) were addressed by the INS when it promulgated the final regulation on December 21, 2000. For example, the new regulation no longer includes the "clear and convincing" evidence standard that aliens had to meet in order to be released under the old regulation and review process. Instead, it provides that the Attorney General may release an alien "if the alien demonstrates to the satisfaction of the Attorney General or [his] designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of

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were in effect during the first two years after IIRIRA was enacted, and then Section 1231(a)(6). See Gov't Br. 32-33, 39; see also *Zadvydas* Gov't Br. 25-26 & n.12. Throughout those periods, the INS endeavored to ensure fair implementation of the program, including development of the interim guidelines in 1999 to regularize custody review timing and procedures, and to remedy some of the problems cited by amici, while the permanent regulation was being developed. Many of amici's complaints date from before those interim procedures were implemented, and all, of course, date from before the December 21, 2000, effective date of the new regulation. They accordingly furnish no basis for concluding that implementation of the new regulation adopted on December 21, 2000, will fail to afford adequate protection to respondent and other aliens.

flight pending such alien's removal from the United States." 8 C.F.R. 241.4(d)(1). The INS also made clear that the regulation does not preclude consideration of the length of time that a detainee has been in immigration custody and the fact that the alien cannot be returned to his country of origin. 65 Fed. Reg. 80,288. And the INS expressed its intent to establish additional pilot projects in the next year to develop supervised release alternatives to detention for aliens under final orders of removal, based on the results of a recently completed study by the Vera Institute of Justice. *Id.* at 80,291.

The INS declined to adopt the suggestion by some commenters that custody determinations be made outside of the INS, pointing to the success of the analogous Mariel Cuban Review Plan. 65 Fed. Reg. 80,284-80,285 (citing *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (rejecting constitutional challenge to use of INS special inquiry officer in deportation proceeding)). The INS emphasized, however, its agreement that specific training is needed for the INS officers who will be making custody recommendations and determinations, noted that such on-going training is provided to the members of Cuban Review Panels, and assured that training "will be maintained and routinely monitored with the implementation of the final rule." *Id.* at 80,284.[10]

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[10] Amici also raise challenges to the conditions of various detainees' confinement. CLINIC Br. 27-30; ACLU Br. 22-23. They cite (CLINIC Br. 25, 28) an investigation by the Justice Department's Civil Rights Division of the use of excessive force against immigration detainees at the Jackson County, Florida, correctional facility. As amici note, INS detainees were held in the jail only until 1998. We have been informed by the INS that it withdrew its detainees from the facility when serious allegations of abuse were substantiated even before the investigation began. Moreover, as amici acknowledge, the INS has recently issued written standards to govern all facilities that house INS detainees in direct response to complaints about conditions of confinement. See Detention Operations Manual (2000). The INS's highest detention priority is the "safe, humane, and secure confinement of illegal aliens." *Id.* at 1; cf. *Flores*, 507 U.S. at 301.

d. Because the new regulation adopted by the INS on December 21, 2000, has not been applied by the INS to respondent, there is no occasion for this Court to consider its application to respondent or others in his position. If the Court reverses the Ninth Circuit's holding that the Attorney General has no statutory authority to detain such aliens—and further holds that the detention does not violate substantive due process—the INS should be given the opportunity to decide in the first instance whether respondent should be returned to and retained in custody under the new regulation. If respondent is detained after that review—and is not removed from the country in the meantime—the district court could entertain any challenges to the INS's procedures and the decision it rendered in a new petition for a writ of habeas corpus at that time.[11]

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

JANUARY 2001

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[11] Respondent's lengthy argument (Br. 25-27) that he does not pose a danger to the community should not be accepted at face value. Respondent ignores, for example, the denials by an immigration judge of his bond requests during the pendency of his removal proceeding, based on findings about respondent's denial of his criminal actions, denial of his gang activity, lack of credibility about his drug abuse, and absence of any evidence of rehabilitation. See Gov't Br. 4-5 & n.3, 12 n.7. Moreover, contrary to respondent's suggestion (Br. 27), the dismissal of the assault charges referred to in our opening brief (at 12-13 n.7) does not mean that the INS would be required to ignore any evidence of conduct underlying those charges, to the extent it was credible and relevant to the issue of future dangerousness.